



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 222 OF 2019

DMC.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **DMC** was charged with the Offence of defilement contrary to section 8 (3) of the Sexual Offences Act. The particulars were that, “**on diverse dates between 2nd October 2012 and 22nd November 2012 at [Particulars Withheld] Location Kwale County within coast region caused his penis to penetrate the vagina of WM, a child aged 12 years.**” He was sentenced to 20 years imprisonment. His appeals did not succeed.

2. The Petitioner is now in this court pursuant to the Supreme decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. That reasoning was adopted in **Dismas Wafula Kilwake v R (2018) eKLR**, where the court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the sexual offences Act:

*“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic**, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”

3. The Petitioner avers that the mandatory nature of the sentence denied the trial court the opportunity to consider mitigating circumstances. Section 8 (3) of the Sexual Offences Act reads thus:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years.”

4. **Ms. Wanjohi** the learned prosecutor submitted that the Petitioner wounded the victim who he knew to be a child. The Petitioner’s barbaric act of inhuman nature violated the victim’s human rights. He assaulted and wounded the victim. Counsel submitted that the Petitioner deserves the sentence meted by the trial court. She urged the court not to interfere with the sentence.

5. In mitigation the Petitioner stated that his family has continued to live desperately since he was the sole income provider. The complainant has since been married and has two children. The Petitioner submitted that he has reconciled with his family members who are ready to welcome him back to the society, and who often visit him to offer him solace. He averred that he has reformed and is now able to

differentiate between good and evil. Further, the Petitioner is HIV positive having acquired the disease from his stay in prison. The Petitioner is 52 years old and is at risk of contracting COVID-19. He prayed to be set free.

6. This Court in **Yusuf Shiunzi v Director of Public Prosecution [2020] eKLR** stated that, *“It is not disputed that the opinion of the Supreme Court with respect to mandatory sentences applies with equal force to minimum sentences”*. This is also supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

“Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.”

7. I have carefully considered the Petition. This Court has the jurisdiction to interfere with the mandatory sentence of 20 years imposed on the Petitioner. In doing that I have considered the following mitigating circumstances of the Petitioner that he has HIV and hypertension; that he has reformed and is now a born again Christian; the Covid-19 pandemic and the need to decongest our prisons.

8. I am satisfied that the Petitioner has made mitigation which this Court should consider, and in light of those mitigation I herewith review the Petitioner’s prison term from 20 years to 14 years from the date of arrest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Mr. Fedha for DPP

Mr. Josephat Court Assistant